No. 95-1837

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

WESLEY ANDRESS,

Petitioner,

vs.

CLEVELAND INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to review the Fifth Circuit's refusal to recognize a judicially created "medical exception" to the eligibility requirements set forth in the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*

2. Is the Fifth Circuit's decision consistent with the IDEA's stated purpose of assuring that all students with disabilities are provided a free appropriate public education designed to meet their individualized and unique needs.

3. Is the Fifth Circuit's decision consistent with prior decisions of this Court concerning the application of IDEA regulations to unilateral actions of parents of disabled students.

4. Whether the district court's judicial creation of a medical exception to the eligibility requirements set forth in the IDEA and its implementing regulations was appropriate and within the equitable powers permitted the district court under the IDEA.

NOTE: While it appears that the Petitioner intends to limit his Petition to his IDEA claims against Respondent, he also specifically states that he "abandons the § 504 of the Rehabilitation Act . . . [and] § 1983 claims as against the Central Education Agency and the Commissioner of Education." *See* Pet., p. 2. In the event certiorari is granted and it is Petitioner's intent to seek review of his § 504 and § 1983 claims against Respondent, Respondent reserves the right to argue that the district court did not err in its dismissal of those claims against Respondent nor did the Fifth Circuit err in affirming the district court's decision.

LIST OF PARTIES

Petitioner is Wesley Andress. Petitioner was Appellee and Cross-Appellant in the Fifth Circuit appeal from which this Petition for Writ of Certiorari arises and was Plaintiff in the United States District Court for the Eastern District of Texas, Beaumont Division, from which the Fifth Circuit appeal arose. Mr. Andress, with his next friends, was also Petitioner in the original administrative hearing below.

Respondent is Cleveland Independent School District. Respondent was one of two Appellants and Cross-Appellees in the Fifth Circuit appeal from which this Petition for Writ of Certiorari arises and was one of three defendants in the United States District Court for the Eastern District of Texas, Beaumont Division, from which the Fifth Circuit appeal arose. Cleveland Independent School District was also Respondent in the administrative hearing below.

Parties to the Proceedings Below:

(1) Wesley Andress, Petitioner/Plaintiff/Appellee/Cross-Appellant.

(2) Mary and Robert Andress, next friends of Petitioner in the administrative hearing and in the appeal to the district court below.

(3) Cleveland Independent School District, Respondent/ Defendant/Appellee/ Cross-Appellee.

(4) Central (Texas) Education Agency, Defendant/Cross-Appellee.

(5) Commissioner of Education of the State of Texas, Defendant.

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OPINIONS BELOW

This action originated as a due process hearing before a Special Education Hearing Officer for the State of Texas, Docket Number 65-SE-1289. The sole issue decided by the hearing officer was whether Petitioner was eligible for special education services. App. A, 3a. On April 10, 1991, the hearing officer found that Petitioner was not eligible for special education services after March 25, 1988. App. A, 18-19. The hearing officer's decision is not reported but is reproduced at Appendix A.

Petitioner and his parents appealed the hearing officer's decision to the United States District Court for the Eastern District of Texas, Beaumont Division, and in connection with that appeal, also asserted § 504 and § 1983 claims against Respondent, the Central Education Agency, and the Commissioner of Education. Petitioner's claims against the Commissioner were dismissed pursuant to the Commissioner's Motion for Summary Judgment. Following the trial of this matter, Petitioner's § 504 and § 1983 claims against Respondent and the Central Education Agency were also dismissed. On March 11, 1994, the district court reversed the decision of the hearing officer. Pet. App. 18. The district court subsequently held an evidentiary hearing (Pet. App. 20-21) to receive evidence on issues which had been specifically excluded from the administrative hearing below. App. A, 3a and 19a. Final Judgment, awarding Petitioner reimbursement for private school costs and related expenses, was issued on June 1, 1994. Pet. App. 20. In response to Respondent's Motion to Clarify, an Amended Final Judgment was entered on June 14, 1994. Pet. App. 20-21. The district court's opinion is unreported.

Respondent appealed the district court's finding of eligibility to the United States Court of Appeal for the Fifth Circuit and Petitioner cross-appealed concerning the denial of

his § 504 and § 1983 claims. On August 28, 1995, the Fifth Circuit affirmed the district court's dismissal of Petitioner's § 504 and § 1983 claims but reversed the district court's decision that Petitioner was eligible for services under the IDEA and rendered a take nothing judgment in favor of Respondent. (Pet. App. 1-7). The Fifth Circuit's decision is reported at 64 F.3d 176.

STATEMENT OF JURISDICTION

Petitioner states that this Court's jurisdiction to consider his Petition arises under 20 U.S.C. § 1254(1). Pet., p. 2. Petitioner, however, requests that this Court not only reverse the Fifth Circuit's decision but that it also "reinstate the district court decision." Pet., p. 5. As explained more fully below, while Respondent agrees that 20 U.S.C. §1254(1) confers jurisdiction upon this Court to review the Fifth Circuit's decision concerning Petitioner's eligibility, it contends that because the district court's jurisdiction was limited to the issue of whether Petitioner was eligible for services after March 25, 1988, this Court's jurisdiction is likewise limited to review of that decision. Petitioner also cites 28 U.S.C. §1201, a statute which does not exist, as the basis for original jurisdiction of this case. Although this is likely a typographical error, CISD reserves the right to address this assertion should it later become relevant.

STATEMENT OF THE CASE

Beginning in March 1988, CISD personnel repeatedly informed Petitioner's parents that his three year comprehensive reevaluation was due and that without such an evaluation, CISD would be unable to establish his continuing eligibility for special education services. Although Petitioner's parents understood that the reevaluation was necessary in order to establish his continuing eligibility for services, Petitioner's parents refused CISD access to Petitioner claiming that CISD could not evaluate

him based on "medical orders." The record in this case, however, establishes that there were no such orders and, in fact, the only evidence that remotely suggests that CISD's reevaluation of Petitioner was contraindicated was the opinion of Petitioner's mother that such testing might be harmful to him. App. A, 17a-18a.

In any event, Petitioner did not enroll at CISD for the 1988-89 school year. As he was well beyond the age of compulsory attendance at that time, CISD could not force him to return to school or to submit to a reevaluation to determine whether he remained eligible for special education services. Relying on the promises of Petitioner's parents that valid independent evaluations were forthcoming, CISD continued to hold ARD meetings throughout the fall of 1988. CISD did not receive the promised evaluations, however, until December 1988. Moreover, despite Petitioner's contentions, none of the evaluations complied with state and/or federal regulations. Although CISD considered the independent evaluations and met with Petitioner's evaluators to try to correct the deficiencies in the evaluations, the problems were never rectified. *See* App. A, 8a-12a. As a result, CISD was legally prohibited from substituting these evaluations for Petitioner's three-year comprehensive evaluation.

While Petitioner continued to refuse to allow CISD to conduct the IQ testing from which a determination of whether he still had a learning disability would be made, he allowed the district to conduct the vision screening and classroom observation portions of the comprehensive evaluation. Petitioner's "medical risk" was apparently not related to actual contact with district personnel but rather, only to contacts that would allow the district to make determinations of eligibility.

In January of 1989, CISD requested a due process hearing to clarify its obligations to Petitioner. In the course of that

proceeding, CISD filed a motion to compel assessment which was denied. The hearing officer ruled that because Petitioner was beyond compulsory attendance age and had chosen not to enroll at CISD for the 1988-89 school year, he had no authority to compel the assessment.

In order to resolve the conflict and address Petitioner's concerns that he not be evaluated by CISD personnel, the district advised Petitioner's parents that it would substitute an evaluation performed by an evaluator selected by them from a list of nine, qualified independent evaluators as his mandatory comprehensive reevaluation. Petitioner's mother, however, rejected this offer, stating that she wanted an "independent evaluation" performed by an evaluator of her choosing.

In December of 1989, Petitioner's parents requested the due process hearing from which the instant action arises. Although Petitioner complained of numerous issues to the hearing officer, including his claim that his independent evaluations established his continuing eligibility and his entitlement to reimbursement for unilaterally obtained services, the hearing officer bifurcated the proceeding. The hearing officer stated that, if necessary, a second hearing would be convened to decide programming, placement, and reimbursement issues. Specifically, the hearing officer only heard evidence and rendered a final opinion concerning whether Petitioner was eligible for special education services after March 25, 1988. Having concluded that Petitioner was not eligible for special education services under the IDEA after that time, the hearing officer found that all remaining issues had been rendered moot.

Petitioner appealed the hearing officer's decision and, in conjunction with his appeal, also asserted § 504 and § 1983 claims against CISD, the Central Education Agency, and the Commissioner of Education. The district court reversed the

decision of the hearing officer and erroneously concluded that "it is the opinion of the Court that Wesley Andress is entitled to whatever relief this Court deems appropriate." Pet. App. 19. Pursuant to 20 U.S.C. § 1415(e)(2)[1] and (f)[2], the district court's jurisdiction was limited to review of final decisions made in a hearing conducted by the state or local education agency. Although Respondent objected to the district court's exercise of jurisdiction over Petitioner's claims that had not been addressed in the administrative hearing below, the district court proceeded to order "an evidentiary hearing in order to determine the 'appropriate relief' to be awarded." Pet. App. 20. CISD appealed

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1. 20 U.S.C. §1415(e)(2) states that:

> [A]ny party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section . . . shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any state court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

2. 20 U.S.C. §1415(f) states that:

> [N]othing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, Title V of the Rehabilitation Act of 1973 [29 U.S.C. A §709 *et seq.*], or other Federal statutes protecting the rights of children and youth with disabilities, except that before the filing of a civil action under such law seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

the district court's decision to the Fifth Circuit and on August 28, 1995, the appellate court reversed the district court's decision and rendered a take-nothing judgment in favor of Respondent.

REASONS FOR DENYING THE WRIT

1. Respondent submits that this Court should not grant certiorari in this case because, *inter alia*, there is no dispute that despite CISD's compliance with its procedural obligations to Petitioner, he was not eligible for services after March 25, 1988. In fact, short of violating its statutory mandate of ensuring that Petitioner's three-year reevaluation met the requirements of 34 C.F.R. §§ 300.532-300.534, CISD made every effort to accommodate Petitioner's demands that he not be tested by school personnel even though it was not required to do so.

Petitioner nevertheless argues that the Fifth Circuit erred in not affirming the district court's equitable right[3] to create an exception to the IDEA's eligibility requirements. While Petitioner urges this Court to adopt the district court's exception, there is no evidence to support a finding that Petitioner would have been at risk of medical or psychological harm had he been evaluated by CISD personnel or by third party professionals

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3. As explained more fully below, this Court has repeatedly held that the IDEA's authorization to grant equitable relief does not arise until after a court has determined that the local education agency has violated the IDEA. *See Florence County School District Four v. Carter*, 114 S. Ct. 361, 366 (1993) (parents not entitled to reimbursement unless court finds school district's placement violated the IDEA); *Board of Educ. of the Henrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, __, 102 S. Ct. 3034, 3051 (1982) (where school district has complied with the "obligations imposed by Congress . . . the courts can require no more."). *Id.* Since it is undisputed that CISD did not violate the IDEA, the district court was not empowered to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2).

designated by CISD. Thus, assuming arguendo, that equity would ever permit the exception articulated by the district court, Petitioner does not qualify for such extraordinary treatment and the Fifth Circuit properly concluded that the district court had erred in creating such an exception in this case. Pet. App. 6-7. Furthermore, the Fifth Circuit correctly noted that even if Petitioner's independent evaluations were valid, which they were not, there is no authority for the proposition that CISD was required to forego conducting its own evaluation. *See* Pet. App. 4-5.

In addition to the lack of factual and legal support for the district court's decision, public policy also prohibits approval of the district court's articulated exception because it places local education agencies such as Respondent in a legal "catch-22." Since Petitioner was not properly evaluated, CISD would have violated the basic tenet of the IDEA that services be designed to meet the unique needs of the student if it had developed an IEP for Petitioner based on his invalid evaluations. By requiring CISD to provide services to a student who does not meet the IDEA's eligibility requirements, the district court's decision effectively forces CISD to risk its federal funding by deliberately violating the Act. *See* 20 U.S.C. § 1416(2).

The district court's decision would also compel CISD to shoulder financial burdens for which it has no statutory obligation. While forcing CISD to provide Petitioner with a unilateral, private placement would be unjust, it pales in comparison to the undue burden and expense local education agencies would be faced with if this Court were to reinstate the district court's "medical exception." Local education agencies would then be required to provide services to every student whose parents claimed they were entitled to them but would not be allowed to determine what services, if any, the student might need. Furthermore, if the agency were to refuse to provide

services, the parents would then be free to choose whatever services they deemed necessary and would be allowed to send the bill to the local education agency. This is plainly not the manner in which Congress envisioned the IDEA would function nor is it consistent with this Court's prior constructions of that Act.

2. Petitioner's argument that he is eligible for services under the IDEA and that the Fifth Circuit's decision therefore conflicts with the stated purpose of the IDEA is completely circular. Pet., p. 4. Although the IDEA's stated purpose is to provide special education services to disabled students, unlike Petitioner, the Act does not simply assume that once a student is disabled and qualifies for services, he is forever disabled and qualified for services. *See* 20 U.S.C. § 1400(c); *see also* 34 CFR § 300.534. The IDEA contains specific provisions for determining initial as well as continuing eligibility and, until these provisions are adhered to, there is no basis for assuming that Petitioner continued to be eligible for services after his 1985 comprehensive evaluation expired. *See* 20 U.S.C. § 1412(5); *see also* 34 CFR §§ 300.532, 300.534. As noted above, providing services based on invalid conclusions would also violate the stated purpose of the IDEA that services be specifically designed to meet a student's unique needs. The Fifth Circuit's refusal to recognize an exception that would qualify an otherwise ineligible student is thus in complete conformity with the stated purpose of the IDEA and Petitioner's argument is without merit.

3. Petitioner also argues that the Fifth Circuit's decision conflicts with this Court's holding in *Florence County School District Four v. Carter*, 114 S. Ct. 361 (1993). In *Florence County*, this Court held that the requirements of § 1401(a)(18) of the IDEA "do not make sense in the context of parental placements," and thus, standing alone, will not bar a parent's claim for reimbursement. *Id.* at 365. Petitioner apparently

assumes that *Florence County* should be read to exempt any and all unilateral action of a parent from compliance with any and all regulations of the IDEA. The Court's reasoning in *Florence County*, however, does not apply here because there is no question that the IDEA intends all evaluations to be judged by the same standards, regardless of who initiates such evaluations. 34 CFR §§ 300.503(c), 300.532, 300.534. Thus, even if the IDEA required CISD to accept Petitioner's independent evaluations in lieu of his three-year comprehensive evaluation,[4] there is no statutory basis for exempting Petitioner's evaluations from compliance with the IDEA's regulations. Pet. App. 4-5

Moreover, *Florence County* also teaches that parents cannot recover reimbursement until they have proven, as a matter of law, that the district in question violated the IDEA *and* that the services obtained by the parents were "proper under the Act." *Id.* at 366. Even if this Court were to reinstate the district court's finding that Petitioner was eligible for services after March 25, 1988, *Florence County* bars his right to reimbursement because it is uncontested that CISD followed the mandates of the IDEA[5]

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4. As noted by the Fifth Circuit, there is no legal basis for requiring CISD to substitute Petitioner's evaluations in lieu of the comprehensive reevaluation. Pet. App. 4-5. *See Doe v. Phillips*, 20 I.D.E.L.R., 1150 (N.D. Cal. 1994) (parents' fear that their child would be traumatized if school district evaluated him was insufficient to override the school district's statutory right to conduct evaluation if parents wanted their child to receive services under the IDEA), a copy of which is reproduced at Appendix B. *See also Gregory K. v. Longview School Dist.*, 811 F.2d 1307, 1315 (9th Cir. 1987) ("If the parents want [the student] to receive a special education under the Act, they are obliged to permit such testing."); *DuBois v. Conn. State Bd. of Ed.*, 727 F.2d 44, 48 (2d Cir. 1984) ("[T]he school system may insist on evaluation by qualified professionals who are satisfactory to the school officials."); *Vander Malle v. Ambach*, 673 F.2d 49, 53 (2d Cir. 1983) (School officials are "entitled to have [the student] examined by a qualified psychiatrist of their choosing.").

5. Despite its purported recognition that its "statutory authority could

(Cont'd)

and there is no evidence that his private placement was appropriate under the Act. In *Florence County*, this Court also advised districts that if they wish to avoid liability under the IDEA, they need only conform to its mandates. *Id.* at 366. It would be wholly inconsistent with this Court's advice if it were to now give credence to the exception urged by Petitioner since that exception effectively renders CISD liable for reimbursement *because* it adhered to the law. *See Florence County*, 114 S. Ct. at 366.

Petitioner's reliance on *School Comm. of Town of Burlington, Mass. v. Dept. of Educ. of Mass.*, 471 U.S. 359, 105 S. Ct. 1996 (1985) is similarly misplaced. Pet., p. 2. Although *Burlington* states that the IDEA authorizes a court to "grant such relief as the court determines is appropriate," such authority only arises *after* the court has held that the school district has violated the IDEA in some manner. *Burlington*, 105 S. Ct. at 2003-2005. *See also Board of Educ. of the Henrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034, 3051 (1982) (court cannot require that school district do more than what Congress has statutorily required). The IDEA's grant of equitable authority is simply not triggered in the face of CISD's undisputed compliance with the Act.

4. Petitioner seeks confirmation by this Court that the district court's creation of a "medical exception" to the IDEA's eligibility requirements was appropriate and "within the equitable powers permitted under the IDEA." Pet., p. i. Respondent maintains that the district court's creation of a

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(Cont'd)
not be read without reference to the obligations, *largely procedural in nature*, imposed by recipient States by Congress," the district court berated CISD for its adherence to the IDEA and characterized its action as a "decision to hide behind mechanical guidelines." Pet. App. 17 (emphasis added, citations omitted).

"medical exception" was not appropriate for the reasons set forth in response to question nos. 1-3 above and was not within the equitable authority granted by 20 U.S.C. § 1415(e)(2) for the reasons set forth in response to question no. 3 above.

Respondent further contends that Petitioner was estopped from invoking the equitable power of the district court because it is axiomatic that one who has not done equity is not entitled to equity. *See also Florence County*, 114 S. Ct. at 366 (when exercising its broad discretion to grant relief, a court must consider all equitable factors). In the instant case, the record is replete with examples of Petitioner's bad faith in refusing to cooperate with CISD, including his allowing CISD to conduct certain portions of his comprehensive evaluation while claiming a medical risk of harm if CISD were to conduct the dispositive IQ tests as well as his claims for reimbursement for the 1990-91 school year after having represented that he was not seeking reimbursement for educational expenses beyond the 1988-89 school year.

Finally, as previously noted, the only final decision rendered by the hearing officer was limited to the issue of Petitioner's eligibility. App. 3a and 19a. The hearing officer specifically announced that Petitioner's remaining claims would be addressed in a second hearing, if necessary. The IDEA only confers jurisdiction upon a district court to review "decisions made in a hearing conducted by the State or a local education agency that are final and reviewable." *Merrifield v. Lake Central School Corp.*, 770 F. Supp. 468, 472 (N.D. Ind. 1991). *See also* 20 U.S.C. § 1415(c) and (e). Thus, the only issue properly ripe for review by the district court was whether Petitioner was eligible for special education services after March 25, 1988. After it reversed the hearing officer's decision, the district court had no other final decisions to review and should have remanded the matter to the hearing officer for further proceedings.

Although CISD objected when the district court announced its intention to hold an evidentiary hearing to decide the issues of programming, placement, and reimbursement, the district court responded that it saw "no useful purpose in remanding the matter back to some local hearing officer."[6] Record on Appeal, v. 5 at 54. The purpose of the IDEA's exhaustion requirement is to provide the parties with the benefit of the "particular expertise of an administrative hearing officer . . . to develop the factual record." *Lester H. by Octavia P. v. Gilhool*, 916 F.2d 865, 869 (3d Cir. 1990), *cert. denied*, 499 U.S. 923 (1991). The district court's action and opinion in this case merely underscores the importance of having a hearing officer who is familiar with the IDEA and its implementing regulations decide issues in controversy.

Regardless of the district court's opinion or understanding of the IDEA, it was not authorized to confer jurisdiction upon itself nor to deprive CISD of the hearing officer's particular expertise with respect to issues which were not the subject of a final and reviewable decision. *See Merrifield*, 770 F. Supp. at 472 (N.D. Ind. 1991). *See also* 20 U.S.C. § 1415(c) and (e). Because the district court lacked jurisdiction to address Petitioner's programming, placement, and reimbursement claims, this Court is likewise deprived of jurisdiction over those claims.

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6. The district court relied on *Burlington* as authority for addressing issues not raised at the hearing below. Pet. App. 19. The facts of *Burlington*, however, are easily distinguishable because, unlike the instant case, the issue of reimbursement was one of the subjects addressed at the administrative hearing and was thus ripe for review. *Burlington*, 105 S. Ct. at 1999.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Court deny the Petition for Writ of Certiorari. Alternatively, should the Court grant the Petition, Respondent submits that review should be limited to the issue of whether Petitioner was eligible for services under the IDEA after March 25, 1988.

Respectfully submitted,

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APPENDIX A — DECISION AND ORDER DATED APRIL 10, 1991

BEFORE A SPECIAL EDUCATION
HEARING OFFICER FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

DOCKET NO. 065-SE-1289

WESLEY A., BNF MR. AND MRS. ROBERT A.,

PETITIONER

VS.

CLEVELAND INDEPENDENT SCHOOL DISTRICT,

RESPONDENT

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Appendix A

DOCKET NO. 065-SE-1289

BEFORE A SPECIAL
EDUCATION HEARING OFFICER
FOR THE STATE OF TEXAS

WESLEY A., BNF MR. AND MRS. ROBERT A.,

PETITIONER

VS.

CLEVELAND INDEPENDENT SCHOOL DISTRICT,

RESPONDENT

DECISION OF HEARING OFFICER

Statement of the Case

Petitioner, Wesley A., by his next friends, Mr. and Mrs. Robert A., filed this action under the Education of the Handicapped Act (hereafter "EHA"), 20 U.S.C. §1400 *et seq.*, (restyled the Individuals with Disabilities Education Act) seeking to establish Wesley's continued eligibility for special education services after March 25, 1988, through an independent educational evaluation obtained by his parents. Respondent, Cleveland Independent School District, contends that it is not legally obligated to accept an independent educational evaluation obtained by Wesley's parent for such purposes and that it is entitled to perform its own comprehensive educational evaluation of Wesley to establish his eligibility for special

education services. Additionally, Cleveland Independent School District contends that Petitioner has refused and thwarted all of its attempts to perform its own comprehensive educational evaluation of Wesley. Moreover, Cleveland Independent School District contends that the independent educational evaluation obtained by Petitioner failed to comply with state criteria and therefore is inappropriate for purposes of establishing Wesley's eligibility for special education services.[1]

Hearing in this matter was held on December 12, 1990 and January 25, 1991. Based on the evidence presented at the hearing, this Hearing Officer makes the following findings of fact and conclusions of law.

Findings of Fact

1. Petitioner, Wesley A., (hereafter "Wesley") is a twenty-year-old male who resides with his parents within the jurisdictional boundaries of Cleveland Independent School District.

2. Respondent, Cleveland Independent School District, (hereafter "CISD") is a political subdivision of the State of Texas and a legally constituted independent school district within Liberty County, Texas.

3. Prior to 1988, Wesley received special education

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1. Petitioner raised numerous other issues in the proceeding regarding CISD's alleged denial of a "free appropriate public education" to Wesley after March 25, 1988. By agreement of the parties, these issues were severed in order to address the primary issue of Wesley's eligibility for special education services after March 25, 1988.

services throughout his educational career within CISD. Wesley's eligibility for special education was based on the results of comprehensive educational evaluations establishing that he was learning disabled, speech impaired, and other health impaired. [T. 133].

4. CISD completed its last comprehensive educational evaluation of Wesley on March 25, 1985. [T. 136].

5. During the 1986-87 school year, Wesley was progressing satisfactorily in a regular education program with special education modifications. [R. Exh. #1].

6. On April 23, 1987, Wesley was admitted by his parents to a psychiatric hospital. This hospitalization was precipitated by a hazing incident by peers at school which occurred during the fall semester of the 1986-87 school year. Wesley was subsequently discharged from this hospital on May 22, 1987. [P. Exh. #3; T. 134].

7. On April 26, 1987, while a patient at the psychiatric hospital, a psychoeducational evaluation of Wesley was completed by Natalia Murray, Ed.D. The intellectual portion of the evaluation reflected that Wesley achieved a verbal scale I.Q. score of 120, a performance scale I.Q. score of 75, and a full scale I.Q. score of 99. These scores indicated that Wesley functioned in the normal range of intellectual potential. However, the evaluator noted a significant 45 point discrepancy between Wesley's verbal and performance I.Q. scores. [P. Exh. #22]. Moreover, based on additional testing, the evaluator concluded that Wesley appeared to have a sensory processing dysfunction in the areas of visual-motor integration, visual-motor spatial and auditory comprehension. [P. Exh. #22].

Appendix A

8. Also during this hospitalization, Wesley underwent a complete neurological, and psychological evaluation. Dr. Barbara Hibner, a child psychiatrist, conducted these evaluations. They indicated that Wesley suffered from a non-verbal learning disability referred to as a developmental arithmetic disorder or developmental Gerstmann Syndrome. [P. Exh. #3, #8, and #9].

9. Persons afflicted with the Gerstmann Syndrome have pronounced problems with social competency and are often viewed as psychologically disturbed or maladjusted when, in fact, many of their difficulties stem from inadequate social and organizational skills. Those diagnosed with the Syndrome normally have a high risk of developing internalized psychopathology. [P. Exh. #3].

10. Dr. Hibner determined that Wesley's cognitive disabilities interfered with his interpersonal functioning and would lead to significant internal psychopathology if not counteracted. She opined that Wesley's level of anxiety reached panic proportions incapacitating him for learning whenever he was subjected to any type of forced interpersonal interaction. She further opined that his traumatic experience with peers in the school environment was the cause of Wesley's suffering and progressive social disability. [P. Exh. #4].

11. In light of these findings, Dr. Hibner determined that it would be medically unwise for Wesley to return to a regular school environment and thus, recommended that CISD provide Wesley with homebound instruction. [P. Exh. #3].

12. An ARD committee meeting was convened August 13, 1987, to discuss Dr. Hibner's evaluation and recommendations

and to develop an educational program for Wesley for the 1987-88 school year. [P. Exh. #4]. The ARD committee agreed to provide Wesley with homebound academic instruction for two hours per day, five days a week. In addition, the ARD committee agreed that Wesley would work twenty hours per week for compensation; receive remedial educational services from Natalia Murray, Ed.D., for four hours per week; swim 30-90 minutes, three times per week; attend physical therapy for 30 minutes, three times per week; develop computer skills; and utilize an academic program for arithmetic. [P. Exh. #4, #8, and #9].

13. Throughout the 1987-88 school year, Wesley received homebound instruction from CISD.

14. Wesley's comprehensive three year educational evaluation which had established his eligibility for special education services expired on March 25, 1988. Prior thereto, CISD had attempted to complete a comprehensive educational reevaluation of Wesley but were denied access to Wesley by his parents for that purpose. [P. Exh. #18; T. 189, 250, 263-267, 272-276].

15. Wesley's parents refused to allow CISD personnel to reevaluate Wesley based on the medical advise from Dr. Hibner that such testing was not necessary and would be too traumatic.

16. Despite the lack of a current comprehensive educational reevaluation establishing Wesley's continued eligibility for special education services as required by the EHA, CISD continued to provide Wesley with special education services through the remainder of the 1987-88 school year.

17. By letter dated May 2, 1988, Wesley's parents contacted the Liberty County Coop's Director of Special Education, Mr. James Garrett, to request that CISD publicly fund a reevaluation of Wesley to be conducted by Dr. Barbara Hibner. [P. Exh. #13]. According to Wesley's mother, the August 13, 1987 ARD committee had agreed that Dr. Hibner could medically evaluate Wesley at the close of the 1987-88 school year to determine whether Wesley would again require homebound instruction during the 1988-89 school year. [P. Exh. #13].

18. Wesley's mother further requested that CISD publicly fund a complete language and auditory assessment of Wesley to be conducted by an independent evaluator of her choice. [P. Exh. #14].

19. During the summer of 1988, CISD continued its attempts to obtain a comprehensive educational reevaluation of Wesley, but Wesley's parents refused. They contended that it was not necessary for CISD to conduct a reevaluation of Wesley because an independent educational evaluation had been completed by Natalia Murray, Ed.D. in April, 1987, during his stay at the psychiatric hospital. Wesley's parents argued that this independent educational evaluation should be utilized by CISD to establish Wesley's continued eligibility for special education services. In the alternative, Wesley's parents requested that CISD finance an independent educational evaluation to be conducted by Dr. Barbara Hibner. [P. Exh. #15].

20. On July 25, 1988, Mr. Garrett notified Wesley's parents that Wesley's previous reevaluation had expired on March 25, 1988. As such, Mr. Garrett requested that Wesley be reevaluated in order to maintain his eligibility for special education services.

[P. Exh. #23]. In this letter, Mr. Garrett agreed that Dr. Natalia Murray's assessment could be considered by CISD but cautioned that it could not be substituted for the legally required three-year reevaluation unless two specific criteria were met. He then noted that the assessment had to be summarized in a report and signed by a person certified to carry out such evaluations and that documentation was needed to indicate that Natalia Murray met the requirements set forth by the Texas Education Agency to perform comprehensive individual assessments.[2] [P. Exh. #23].

21. Dr. Murray's evaluation of Wesley did not reflect her credentials nor was it signed. [P. Exh. #22].

22. Based on subsequent conversations with CISD personnel, Wesley's mother understood that CISD would not accept the evaluations of Dr. Murray and Dr. Hibner as a substitute for the three-year comprehensive educational reevaluation required to establish Wesley's eligibility for special education services. Thus, Wesley's mother obtained an independent educational evaluation on August 1, 1988, from Lendell Braud, Ph.D., a licensed psychologist. [R. Exh. #4].

23. The independent educational evaluation completed by Dr. Braud failed to comply with the criteria set forth by the State Board of Education for comprehensive individual assessments. [See 19 TEX. ADM. CODE §89.233]. Dr. Braud's evaluation failed to adequately assess the areas of language dominance, language, physical, emotional/behavioral, sociological, and learning competencies. When these discrepancies were brought

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2. 19 TEX. ADM. CODE §89.214(i) authorizes an "educational diagnostician" to assess intelligence and educational functioning of handicapped students.

to light, Dr. Braud performed additional testing and modified her independent educational evaluation. [P. Exh. #11].

24. Dr. Braud's evaluation did include an intellectual assessment which indicated that Wesley's overall I.Q. score of 107 was in the normal range. This assessment also identified a 31 point discrepancy between Wesley's verbal scale I.Q. score of 120 and his performance scale I.Q. score of 89. [R. Exh. #4].

25. Based on the results of her evaluation, Dr. Braud recommended that CISD provide Wesley with a year-round intensified educational remediation program in a small class setting. Dr. Braud opined that returning Wesley to a CISD campus would produce extreme levels of anxiety while confining Wesley to homebound instruction would result in serious social skill deficiencies. Accordingly, Dr. Braud recommended that the ARD committee consider placing Wesley in a therapeutic educational program outside the public school system. [P. Exh. #11].

26. In addition to Dr. Braud's independent educational evaluation, Wesley's mother retained Dr. Barbara Hibner to medically reevaluate Wesley on August 31, 1988. Based on the results of this medical evaluation, Dr. Hibner noted that Wesley's self-esteem had greatly improved since his psychiatric hospitalization, but his academic skills had not measurably progressed. [P. Exh. #5, #6, and #7]. Dr. Hibner cited right hemisphere, cerebellar brain, parietal and occipital brain dysfunctions as specific causes for Wesley's deficiencies. [P. Exh. #5, #6, and #7].

27. Dr. Hibner submitted her evaluation and findings to CISD on three separate occasions by letters dated September 19,

1988, October 14, 1988, and February 1, 1989. In each letter, Dr. Hibner changed her recommendation for Wesley's placement. However, in her final letter dated February 1, 1989, Dr. Hibner opined that Wesley required a year-round academic program for three years consisting of small group interaction in a therapeutic milieu staffed with teachers skilled in educating the learning disabled and rehabilitating physical handicaps. [P. Exh. #7].

28. Wesley did not enroll in CISD for the 1988-89 school year. Instead, Wesley's parents unilaterally placed him in a private school.

29. On March 17, 1989, CISD held an ARD committee meeting to consider the appropriateness of Dr. Braud's modified August 1, 1988, independent educational evaluation. The ARD committee correctly confirmed that there still existed a number of deficiencies in Dr. Braud's evaluation which failed to comply with State Board of Education rules governing comprehensive individual assessments. [R. Exh. #5].

30. Thereafter, an ARD committee meeting was convened on April 4, 1989, with Dr. Braud present, to again address the ARD committee's concern that her independent educational evaluation of Wesley did not comply with State Board of Education regulations. In particular, the ARD committee questioned the validity of Dr. Braud's independent educational evaluation because 1) Wesley was not observed in an educational setting, 2) the report did not identify Wesley's learning competencies, 3) his language dominance was not established, and 4) neither a sociological background nor a vision and hearing screening was completed prior to the assessment. [P. Exh. #18]. Furthermore, the ARD committee noted that Dr. Braud's report did not include criterion referenced or curriculum referenced

tests from which IEP goals and objectives could be developed. [P. Exh. #18].

31. The ARD committee further questioned the recommended placement detailed in Dr. Braud's report. Specifically, CISD questioned Dr. Braud's recommendation that Wesley be provided with a year-round, small group, therapeutic program in a private school setting. [P. Exh. #18].

32. The April 4, 1989 ARD committee correctly determined that Dr. Braud's independent educational evaluation failed to meet state criteria governing comprehensive individual assessments and that in order to validate Dr. Braud's independent educational evaluation, CISD would require its own current comprehensive educational reevaluation of Wesley. Thus, CISD again requested that it have the opportunity to assess Wesley, and in the alternative, that Wesley's mother present Wesley for an independent educational evaluation to be conducted by one of four recommended independent evaluators chosen by CISD. [P. Exh. #18].

33. Wesley's mother refused to allow CISD access to Wesley citing Dr. Hibner's recommendation that Wesley not undergo further evaluation by CISD personnel. Dr. Hibner's recommendation was based on the risk of further traumatizing, Wesley and on her belief that he had been evaluated too many times in recent years. [T. 59, 71, and 142].

34. On June 6, 1989, an independent speech and language evaluation was conducted at the request of Wesley's mother by Judith Arceneaux, a speech and language pathologist. [P. Exh. #1]. The results of this evaluation established that Wesley exhibited moderate to severe communication difficulties for a

student his age. Specific areas of difficulty included vocabulary, linguistic and semantic comprehension; short-term auditory memory for multi-level oral directives; inferential thinking; comprehension of metaphoric expressions; grammar and syntax; and functional language skills. [P. Exh. #1].

35. The speech pathologist believed Wesley to be eligible for special education services as a speech handicapped student based on a 29 point difference between Wesley's full scale I.Q. score of 107 (taken from the August 1, 1988 evaluation) and his total language score of 78 taken from the Clinical Evaluation of Language Fundamentals-Revised (hereafter "CELF-R"). [P. Exh. #1]. She also recommended that he receive individual and group speech therapy services three to four times per week. In addition, she recommended extended year services as vital for Wesley's academic success as well as to improve his social communication skills. [P. Exh. #1].

36. On June 26, 1989, CISD convened another ARD committee meeting to determine Wesley's eligibility for special education services. [R. Exh. #6]. On this occasion, a revised version of Dr. Braud's independent educational evaluation was submitted to the ARD committee for consideration. However, once again CISD's ARD committee determined that insufficient data had been presented from which to determine Wesley's eligibility for special education services. [R. Exh. #6].

37. The ARD committee again met on March 21, 1990, to further consider the appropriateness of the independent educational evaluations presented by Wesley's mother. [R. Exh. #7]. This meeting was concluded with a majority of the ARD committee members agreeing that further assessment data was required in order to establish Wesley's eligibility for special

education services. Specifically, the ARD committee found that it lacked a comprehensive math evaluation, an occupational therapy assessment, an assessment of vocational needs, a multi-disciplinary team report and observation, current grades, and a speech assessment administered with age appropriate testing. [R. Exh. #7].

Discussion

The relevant evidence presented in this matter is relatively undisputed. Wesley's eligibility for special education services under the EHA expired on or about March 25, 1988, three years from the date of his last comprehensive educational reevaluation. At that time, Wesley was receiving homebound services from CISD. In this placement, Wesley's parents were able to thwart any attempts made by CISD to obtain a comprehensive educational reevaluation of Wesley prior to the March 25, 1988 expiration date of Wesley's eligibility for special education services. Thereafter, Wesley's parents continued to prevent CISD from completing its own comprehensive educational reevaluation of Wesley. Instead, Wesley's parents asserted that they had privately obtained independent educational evaluations of Wesley which CISD should utilize to establish Wesley's continued eligibility for special education services.

Accordingly, the issue presented is whether Wesley's parents can preclude CISD from conducting its own three-year comprehensive educational reevaluation of Wesley as required by 34 C.F.R. Reg. 300.534(b), by obtaining an independent educational evaluation at private expense for purposes of establishing Wesley's continued eligibility for special education services.

Appendix A

The primary purpose of the Education for the Handicapped Act, is to ensure that all handicapped children have available to them a free appropriate public education which includes special education and related services to meet their unique educational needs. [20 U.S.C. §1400(c)]. To accomplish this goal, the EHA and its implementing federal regulation described and defined those children it considered as handicapped.[3] Moreover, the EHA's implementing federal regulations placed the burden on the public educational agencies to determine through the evaluation procedures which children within their jurisdiction were handicapped and qualified for special education services.[4]

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3. The EHA's implementing federal regulations defined the term "handicapped children" as meaning:

> "those children evaluated in accordance with Reg. 300.530- 300.534 as being mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multi-handicapped, or as having specific learning disabilities, who because of those impairments need special education and related services."

[34 C.F.R. Reg. 300.5].

4. 34 CFR Reg. 300.534 requires that each state and local educational agency insure:

> "a. That each handicapped child's individualized education program is reviewed in accordance with Regs. 300.340 - 300.349 and Subpart C; and
>
> b. That an evaluation of the child, based on procedures which meet the requirements under Reg. 300.532 is conducted every three years or

(Cont'd)

Appendix A

Wesley's parents contend that the independent educational evaluations submitted to CISD's ARD committee met the criteria of a comprehensive three-year educational reevaluation and established Wesley's continued eligibility for special education services after March 25, 1988. Wesley's mother further contends that CISD should accept these independent educational evaluations and be precluded from conducting its own reevaluation.

This Hearing Officer disagrees. Although the applicable federal regulations do not mandate that state and local educational agencies actually conduct the required three-year comprehensive educational reevaluation, it places the legal burden on such agencies to *insure* that an evaluation which meets the requirements under 34 C.F.R. Reg. 300.532 is conducted at least every three years. [34 C.F.R. Reg. 300.534].

Accordingly, in the instant action, CISD was responsible for insuring that a three year comprehensive educational reevaluation of Wesley that met the applicable federal and state criteria was completed on or before March 25, 1988. In accordance with this responsibility, CISD's ARD committee determined that the independent educational evaluation obtained by Wesley's parents did not meet the applicable federal and state criteria and sought to obtain its own comprehensive educational reevaluation of Wesley. This determination was not unreasonable and was clearly within the ARD committee's discretion.

(Cont'd)

more frequently if conditions warrant or if the child's parent or teacher requests an evaluation. [34 C.F.R. 300.5341."

Appendix A

Based on a review of the applicable federal regulations, this Hearing Officer finds that an ARD committee has the right to either accept or reject a parent obtained independent educational evaluation for purposes of establishing a student's eligibility for special education services. That is, there is no regulatory requirement that an ARD committee accept a parent obtained independent educational evaluation in lieu of conducting its own evaluation.[5] Under the applicable federal regulations, school districts always have the option of using their own personnel to complete a reevaluation of a handicapped student for purposes of addressing the continued eligibility of that student for special education services. Accordingly, CISD cannot be precluded from conducting its own reevaluation of Wesley merely because Wesley's parents prefer to use a privately obtained evaluation.

Although the federal regulation governing independent educational evaluations [34 C.F.R. Reg. 300.503] guarantees parents of a handicapped child the right to obtain an independent educational evaluation, it does not grant to parents the right to substitute such an independent evaluation for that of the school district. Instead, Reg. 300.503 only requires that school districts consider any independent educational evaluation obtained by parents in any decision made with respect to the provision of a free appropriate public education. [34 C.F.R. Reg. 300.503(c)(1)]. Accordingly, although CISD is obligated to consider any independent educational evaluation that meets agency criteria, it is not bound by any of the findings or conclusions contained therein, and it is not precluded by this federal regulation or any other federal regulations from

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5. If parents avail themselves of public school resources, the district has a right to perform its own comprehensive testing. [*See Gregory K. v. Longview School District*, 811 F.2d 1307 (9th Cir. 1987)].

completing and utilizing its own comprehensive educational evaluation for purposes of determining the eligibility of a student for special education services.

Consequently, CISD cannot be legally compelled to accept a privately obtained independent educational evaluation to establish the eligibility of a handicapped student for special education. Instead, it always retains the right to conduct its own comprehensive educational reevaluation for such purposes.

Wesley's parents next argue that they refused to produce Wesley for a CISD comprehensive educational reevaluation upon the advice of Wesley's psychiatrist that further testing by school district personnel would be counterproductive and harmful to Wesley and that for these reasons, CISD should accept the independent educational evaluation that they obtained.

This Hearing Officer again disagrees. The limited evidence presented regarding this argument established that Wesley experienced some type of traumatic hazing activities on the CISD campus that resulted in his psychiatric hospitalization. However, the evidence further established that when CISD personnel were notified by Wesley's parents of the medical and psychiatric concerns raised by Wesley's psychiatrist regarding school district personnel conducing a reevaluation of Wesley, they agreed to obtain independent evaluators to complete the reevaluation. There was no indication in the record that such an evaluation by independent evaluators selected by the school district was psychiatrically contraindicated. Moreover, any concerns by Wesley's psychiatrist regarding "overtesting" does not justify the parents refusal to allow CISD to complete its legally mandated comprehensive individual assessment of Wesley for educational purposes especially in light of the fact

that Wesley's parents were the cause of any "overtesting" concerns. Accordingly, this Hearing Officer finds the rejection by Wesley's parents of CISD's offer to use independent evaluators to be unreasonable.

For these reasons, this Hearing Officer finds that Wesley's parents wrongfully denied CISD the opportunity to reevaluate Wesley in 1988 and further concludes that CISD is not obligated to determine Wesley's eligibility for special education and related services until such time as CISD personnel or its approved independent evaluators are provided the opportunity to conduct a comprehensive educational reevaluation of Wesley in compliance with federal and state regulations. See *Gregory K. v. Longview School District*, 811 F.2d 1307 (9th Cir. 1987); *DuBois v. Connecticut Ed.*, 727 F.2d 44, 48 (2nd Cir. 1984); *Carrol v. Capallo*, 563 F. Supp. 1053, 1058 (D. R.I. 1983).

Conclusions of Law

After due consideration to matters of record, matters of official notice and the foregoing findings of fact, in my capacity as a Special Education Hearing Officer for the State of Texas, I make the following conclusions of law:

1. Respondent, Cleveland Independent School District, being Wesley's resident district, was required by the EHA to insure that a three-year comprehensive educational reevaluation of Wesley was completed on or before March 25, 1988. 20 U.S.C. §1412(5)(c), 34 C.F.R. Reg. 300.534.

2. Wesley's parents refused CISD access to Wesley for evaluation purposes and thus thwarted all attempts by CISD to comply with the EHA's requirement to timely complete its three

year comprehensive educational reevaluation of Wesley. 34 CFR Reg. 300.534.

3. CISD's ARD committee cannot be compelled to accept an independent educational evaluation obtained by Wesley's parents pursuant to 34 C.F.R. Reg. 300.503(c) for purposes of establishing Wesley's eligibility for special education services. CISD retains the right to complete its own three-year comprehensive educational reevaluation for purposes of establishing Wesley's eligibility for special education services.

4. If Wesley's parents want Wesley to receive special education services under the EHA, they are obligated to permit CISD to complete a comprehensive educational reevaluation of Wesley. *Gregory K. v. Longview School District*, 811 F.2d 1307 (9th Cir. 1987).

5. Because Wesley's parents have failed to allow CISD to establish Wesley's eligibility for special education services after March 28, 1988, all remaining issues involving the alleged denial of a free appropriate public education to Wesley after March 25, 1988, have been rendered moot.

Order

After due consideration of the record, the foregoing findings of fact, and conclusions of law, this Hearing Officer ORDERS that all relief sought by Petitioner be DENIED.

SIGNED this 10th day of April, 1991.

s/ James W. Holtz
James W. Holtz
Special Education Hearing Officer

Appendix A

NOTICE TO THE PARTIES

Following the March 3, 1983 decision of the Court of Appeals, Third Supreme Judicial District of Texas at Austin, in *Manor Independent School District v. Leachelle N.*, 647 S.W.2d 770 (Civ. App. — Austin, 1983) and pursuant to the provisions of the Administrative Procedure and Texas Register Act, TEX. REV. CIV. STAT. ANN. art. 6252-13a (Supp. 1982), a timely motion for rehearing to the State special education hearing officer will be required in order to perfect an appeal from the hearing officer's decision to a State district court. The parties should give particular attention to sections 16 and 19 of the Act, regarding finality of decisions and judicial review.

Appendix A

SYNOPSIS

ISSUE: Whether parents can compel a school district to accept a parent obtained independent educational evaluation in lieu of conducting its own evaluation for purposes of establishing their child's continued eligibility for special education services.

HELD: Parents cannot compel a school district to accept a parent obtained independent educational evaluation and thereby prevent a school district from conducting its own evaluation to establish a child's eligibility for special education services. School districts always have the right to complete their own evaluations of students for determining their eligibility for special education services. School district's only duty regarding parent obtained independent educational evaluations is to consider such evaluations. School districts cannot be compelled to accept the findings or conclusions of any independent educational evaluation without having the opportunity to conduct its own comprehensive educational evaluation of the student.

APPENDIX B — OPINION IN *DOE V. PHILLIPS*, 20 I.D.E.L.R. 1150 (N.D. CAL. 1994)

James **DOE**, By and with his Parent, Joan **DOE**,

Plaintiff

v.

Don **PHILLIPS** as Superintendent and **THE MOUNTAIN VIEW-LOS ALTOS UNION HIGH SCHOOL DISTRICT, SANTA CLARA COUNTY OFFICE OF EDUCATION** and **CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION**, and **CALIFORNIA DEPARTMENT OF EDUCATION**,

Defendants

No. C 93-20234 JW

U.S. District Court, Northern District of California

February 8, 1994

* * *

Counsel for Parents: Sheila L. Brogna, 114 Sanasome, Suite 817, San Francisco, California 94104.

Counsel for District: Eliza J. McArthur, 12280 Saratoga-Sunnyvale Road, Suite 201, Saratoga, California 95070.

HONORABLE JAMES WARE, United States District Judge

Appendix B

Introduction

Before this Court is Plaintiff's Motion for Preliminary Injunction and Defendant's Motion to Dismiss or in the alternative, Motion for Judgment on the Pleadings and Motion for Summary Judgment. These Motions came on regularly before the Court on January 28, 1994. Based on the submitted pleadings and oral argument of counsel the Court GRANTS Defendant's Motion to Dismiss.

Factual Background

The focus of this lawsuit is the education of James Doe ("James"). James is a developmentally disabled, language impaired 20 year old man. He has pursued a course of special education classes throughout his life.

In 1988, James Doe and his mother Joan Doe ("Joan"), moved to Los Altos. The Los Altos-Mountain View School District placed James in the McKinnon School special day class on an interim basis. An Individualized Education Plan ("IEP") meeting was conducted to determine permanent placement.

After the IEP meeting was held, the parties agreed on the plan but not the placement. The District proposed continued placement at McKinnon. James' attorney requested a due process hearing. It was held during January-March 1991 (the decision issued June 5, 1991). In April, however, James was hit by a car and he suffered a closed head injury. Joan advised the District that new evaluations were being conducted at the request of his treatment providers. Joan believed the evaluations were important in order to devise a new educational plan for James.

Appendix B

On December 12, 1991, new evaluations were sent to the District. James' attorney requested an IEP meeting. Prior to changing any plan, the District insisted that it conduct its own assessment.

Joan did not want her son James to undergo additional testing. James' attorney and the District agreed that the preliminary issue of law was whether the District has a right to conduct its own reassessment when privately obtained assessments are available.

On May 6, 1992, a Due Process Hearing was held on this issue. On June 10, 1992, a Due Process Hearing Officer held that the District was entitled to obtain their own assessment. Joan refused to participate in the hearing after this determination was made.

A complaint to appeal the assessment decision was filed on July 9, 1992, before Judge Ware. This was dismissed without prejudice on March 10, 1993 for failure to serve the complaint. The dismissal was appealed to the 9th circuit. Plaintiffs were concerned that a statute of limitations argument might bar the refiling of their case. The Ninth Circuit upheld the dismissal. Plaintiffs refiled their action on April 23, 1993. The Does added a 29 U.S.C. § 794 (Title V § 504) and a 42 U.S.C. § 1983 claim as well as a claim for reimbursement for money spent educating James throughout this litigation.

Discussion

1. Issue Before the Court

There is only one issue properly before this Court: whether

or not the Due Process Hearing Officer's decision should be upheld. The Officer ordered that James submit to an assessment by the District prior to the District providing new educational placement.

The Does argue that since they had already provided the District with current comprehensive assessments the District should not be allowed to reassess James. The Does mention potential trauma to James from undergoing a reassessment but no clear evidence on the point is before the Court.

The Court affords broad discretion to the Due Process hearing Officer in reaching the decision on whether or not to allow the District to reassess James. The Hearing Officer was privy to all information presented and determined an assessment was appropriate. Plaintiff has presented no case law holding that the District is not entitled to reassess James under the circumstances before the Court.

2. Sections 504 and 1983

Title V Section 504 states in relevant part:

> [n]o otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Appendix B

42 U.S.C. 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Plaintiff has attempted to allege claims under the above two statutes. The Does do not, however, allege any facts over and above the facts alleged in the claims brought under the Individuals with Disabilities Act ("IDEA"). In 20 U.S.C. § 1415(f), the IDEA legislation states that although the statute does not restrict or limit the rights, and remedies available under other statutes, this does not mean that a plaintiff suing under IDEA may seek relief pursuant to section 504 or section 1983 on the same set of facts, with nothing more.

The Ninth circuit stated in *Doe v. Maher,* 793 F.2d 1470 (1986) aff'd on other grounds sub nom., *Honig v. Doe,* 484 U.S. 305, (1988):

> Even assuming that the reach of section 504 is coextensive with that of the [IDEA], there is no doubt that the remedies, rights, and procedures Congress set out in the EHA are the ones it intended to apply to a handicapped

> child's claim to a free appropriate public education. We are satisfied that Congress did not intend a handicapped child to be able to circumvent the requirements or supplement the remedies of the [IDEA] by resort to the general, antidiscrimination provision section.

Doe at 1479, citing *Smith v. Robinson*, 468 U.S. 992, (1984). Also see *Barnett v. Fairfax County School Board*, 721 F.Supp. 755 (1989) aff'd 927 F.2d 146 (4th Cir. 1992) ". . . this court is of the view that a [Section] 1983 claim must do more than merely reallege a violation of the underlying statute to constitute a viable claim for damages." *Id.* at 757.

Since no issues are pled in the Section 504 and Section 1983 claims, over and above the IDEA claim, such as bad faith or gross negligence, the Does' Section 504 and Section 1983 claims must fail.

3. Failure to Exhaust Remedies

The Does are seeking reimbursement for money spent educating James. The Does have failed to exhaust administrative remedies. The only issue taken to the Due Process hearing officer was that of the legality of the District requiring a new assessment. As no other issue was decided by the hearing officer, these other issues are not properly before this Court. *See* 20 U.S.C. § 1415(b)(2)(c)(e)(f).

4. Statute of Limitations

An additional reason that the Section 1983 and Section 504

claims are barred is that they were not brought within the applicable one year statute of limitations. These claims allegedly stem from unanswered request to hold an IEP meeting in December, 1991, and a subsequent failure to provide a free education for James. Given that the complaint first raising these issues was filed on April 7, 1993, these claims are time barred. *See Taylor v. The Regents of the University of California*, 993 F.2d 710 (9th Cir. 1993) *cert. denied* 1993 WL 48 1975 U.S. (1994) and *Greater Los Angeles Council on Deafness, Inc. v. Zoloin*, 812 F.2d 1103, 1107 (9th Cir. 1987).